
No. 11733

**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

UNITED STATES OF
AMERICA,

Appellant,

v.

J. H. GALLAGHER, J. IRA
McNUTT, and Earl L. McNUTT,
Appellees.

BRIEF OF APPELLEES

Upon Appeal from the District Court of the
United States for the District of Oregon

LAWRENCE T. HARRIS,
201 Miner Building,
Eugene, Oregon,

KOERNER, YOUNG, SWETT & MCCOLLOCH,
JAMES C. DEZENDORF,
800 Pacific Building,
Portland 4, Oregon,
Attorneys for Appellees.

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PAUL A. BROWN,
CLERK

INDEX

	Page
STATEMENT OF THE CASE.....	1
A. Facts giving rise to this Tucker Act claim....	1
B. The condemnation action relating to the Gossler land	5
C. The issues submitted and the findings of the trial court	9
PROPOSITIONS OF LAW INVOLVED I.....	12
Since the whole record in the condemnation action relating to the Gossler land was before the court below and was considered by it in mak- ing its Findings of Fact and since said record is not included in the record on appeal herein, Ap- pellant may not attack the findings of fact on this appeal	12
PROPOSITIONS OF LAW INVOLVED II.....	13
Since no condemnation action was ever filed re- lating to the Crown Zellerbach Corporation property and Appellees were not joined in the condemnation action relating to the Crocker land and no Tucker Act case prior to this one was ever filed to recover the value of the Gov- ernment's use of Appellees' road, Appellant never acquired title to the whole road and Ap- pellees are entitled to recover.....	13
(a) The only way the Government can ac- quire title to real property without a vol- untary conveyance is by a condemnation proceeding or by payment of a judgment recovered by the land owner in a Tucker Act case	13

INDEX (Continued)

	Page
(b) Where one entitled to exercise the right of eminent domain enters upon land without first compensating the owner, the owner may sue for the value of the land and upon payment of the judgment a grant of the land for public use is effected	13
(c) Where one entitled to exercise the right of eminent domain enters upon land without first compensating the owner, the owner may sue for the value of his land and also for the value of its use pending determination of the value of the land and payment of the award . . .	13, 14
(d) The Government's possession and use of property without making a deposit under the Declaration of Taking Act or payment of a judgment in a condemnation action does not pass title to the Government. Title passes as of the date of the filing of the declaration of taking or if no declaration of taking is filed, as of the date of payment of the judgment	14
(e) Under the Oregon constitution, one authorized to acquire property by the exercise of the power of eminent domain does not acquire title until payment of the judgment and then as of the date of payment and not as of date of filing the proceeding	14
(f) In condemnation proceedings title passes when the declaration of taking is filed and appropriate deposit is made and not when possession is taken	14, 15
(g) If no declaration of taking is filed, title passes when the condemnation judgment is paid	15

INDEX (Continued)

	Page
(h) One not joined in a condemnation proceeding is not bound by the proceeding and loses no rights thereby. A Tucker Act case is the proper method of securing compensation	15
ARGUMENT	15
Since the evidence upon which the trial court's findings of fact were made is not included in the record on appeal, Appellant may not attack them	15
Since no condemnation action was ever filed relating to the Crown Zellerbach Corporation property and Appellees were not made parties to the condemnation action relating to the Crocker land and no other Tucker Act case to recover the value of the Government's use of Appellees' road has ever been filed, the Government never acquired title to the whole road and Appellees are entitled to recover.....	17
The evidence supports the amount of the trial court's award	24
CONCLUSION	26

TABLE OF CASES

	Page
Barnidge v. United States (C.C.A. 8th), 101 F.	
(2d) 295	15, 18, 22, 23
Boyle v. United States (C.C.A. 9th), 149 F. (2d)	
201	12
City of Salem v. Marion County, 171 Ore. 254,	
137 P. (2d) 977	14, 22, 23
Fletcher v. Delaware L. & W. R. Co. (C. C. A. 2d),	
79 F. (2d) 306.....	14, 19, 22, 23
Griffiths Dairy v. Squire (C.C.A. 9th), 138 F.	
(2d) 758	12
Lubetich v. United States, 315 U. S. 57, 62 S. Ct.	
449, 86 L. ed. 677.....	12
Petition of Gogate (C.C.A. 3rd), 126 F. (2d) 1020	12
Phillips v. United States (C.C.A. 7th), 151 F.	
(2d) 645	15, 18, 19
Sanders v. Portland & O. C. Ry. Co., 98 Ore. 620,	
193 Pac. 660	14, 19, 22, 23
Sublette v. Servel (C.C.A. 8th), 124 F. (2d) 516..	12
United States v. 150.29 Acres of Land, etc., in	
Milwaukee C., Wis. (C.C.A. 7th), 135 F. (2d)	
878	15, 18, 22, 23
United States v. Bouchard (C.C.A. 2d), 64 F.	
(2d) 482	15, 18, 22, 23
United States v. Certain Parcels of Land (D.C.	
D. Md.), 40 F. Supp. 436.....	15, 18, 19, 22, 23
United States v. Certain Parcels of Land, etc.	
(D.C.D. Md.), 61 F. Supp. 164.....	14, 18, 22, 23
United States v. Certain Parcels of Land at	
Hempstead, etc. (D.C., E.D.N.Y.), 51 F. Supp.	
726	14, 18, 19, 22, 23
United States v. Foster (C.C.A. 9th), 123 F. (2d)	
32	12
United States v. Lynah, 188 U. S. 445, 23 S. Ct.	
349, 47 L. ed. 539.....	13, 17
United States v. Portneuf-Marsh Valley Irr. Co.,	
205 Fed. 416	13

STATUTE

Federal Rules of Civil Procedure, Rule 52 (a),	
28 U. S. C. A., following Section 723c.....	12

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BRIEF OF APPELLEES

Upon Appeal from the District Court of the
United States for the District of Oregon

STATEMENT OF THE CASE

A. Facts giving rise to this Tucker Act Claim.

On April 11, 1942, Appellee Gallagher entered into a written contract with Crown Zellerbach Corporation whereby Crown Zellerbach granted to Appellee Gallagher the right for a period beginning April 11, 1942, and extending to and including the 31st day of December, 1945, to take sand and gravel from the Santiam Bar

adjacent to and on the westerly side of the Willamette River in Benton County, Oregon (R. 5, 33, 48, 97).

On April 13, 1942, Appellee Gallagher and Appellees McNutts entered into a written contract whereby Appellee Gallagher agreed to do certain things and Appellees McNutts agreed, among other things, to install bunkers, machinery and equipment on the gravel bar and to process sand and gravel from the Bar. The profits of the venture were to be divided between Appellee Gallagher and Appellees McNutts (R. 17, 34, 48, 110).

In order to have access to the Santiam gravel bar to take in the equipment necessary to process sand and gravel and to transport sand and gravel produced to market, it was necessary for Appellees to build a road 1.8 mile long from the county road—first across land owned by the Crockers, then across land owned by the Gosslers and finally across land owned by Crown Zellerbach Corporation (R. 34, 49).

Appellees procured (R. 35, 49) and recorded (R. 135) appropriate easements upon which to construct their road from the Crockers and the Gosslers and the contract between Appellee Gallagher and Crown Zellerbach Corporation granted an easement to construct a road over its property lying between the Santiam Bar and the Gossler property (R. 7, 99).

Between April 13, 1942, and June 18, 1942, Appel-

lees constructed their road from the county road to the Santiam Bar (R. 34, 49) and processed, washed, screened and stockpiled upon the Santiam Bar 13, 743 cubic yards of sand and gravel (R. 37, 51).

In the contract of April 11, 1942, between Crown Zellerbach Corporation and Appellee Gallagher, Crown Zellerbach reserved the right to sell sand and gravel located on the Santiam Bar to others (R. 14, 107). The contract also provided that the road to be built by Appellees from the county road across the Crocker land, the Gossler land and the Crown Zellerbach land should be available to any persons to whom Crown Zellerbach might sell sand and gravel from the Bar :

“* * * provided * * * such persons * * * shall reimburse the Purchaser (Appellees) on some reasonable basis for the use of such private roads; such reimbursement to be at a reasonable royalty rate on a per cubic yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads, taking into consideration the yardage of sand and gravel being hauled by the Purchaser (Appellees) and the yardage of sand and gravel to be hauled by the Seller or such persons, firms or corporations to whom it might sell sand and gravel.” (R. 8, 100)

Between May 9, 1942, and October 1, 1942, Appellees sold and removed from their stockpiles on the Santiam

Bar and transported over their road 3,740 cubic yards of sand and gravel (R. 37, 51).

Prior to July 1, 1942, Crown Zellerbach Corporation granted to Strong and McDonald the right to remove sand and gravel from the Santiam Bar. Strong and McDonald then negotiated with Appellees for the use of their road and paid Appellees \$3,000.00 (R. 37, 51) on the representation that they wished to take 30,000 cubic yards from the Bar over Appellees' road. The \$3,000.00 figure was arrived at by charging 10c a cubic yard for the 30,000 cubic yards which Strong and McDonald said they desired to take out over the road (R. 127, 128).

As it turned out, between July 1, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel from the Santiam Bar over Appellees' road (R. 37, 51).

On November 18, 1942, Crown Zellerbach Corporation granted permission to the United States Army to remove sand and gravel from the Santiam Bar (R. 38, 51, 72), which grant provided:

“It should be understood, of course, that the rights of Mr. J. H. Gallagher of Corvallis, Oregon under an agreement of April 11, 1942 between the said Gallagher and the undersigned Corporation, a copy of which agreement is in your possession, will be protected.” (R. 72, 79).

Between October 1, 1942, and August 19, 1944, the United States Army, without negotiating with or arranging for payment to Appellees for its use of the road as required by Appellees' contract with Crown Zellerbach Corporation, moved 66,643 cubic yards of sand and gravel from the Santiam Bar over Appellees' road (R. 38, 51, 133).

The United States Army was fully advised of Appellees' interest in their road at the time the road was used by it in hauling 66,643 cubic yards of sand and gravel thereon and the United States Army's use thereof was not made under a claim of ownership (R. 52, 134).

Appellees' road cost \$10,190.00 (R. 52, 123, 127). Appellee Gallagher testified that 10c a cubic yard or \$6,664.30 was the reasonable and fair market value of Appellant's use of the road (R. 127, 130).

The trial court found that \$5,816.00 was the reasonable and fair market value of Appellant's use of the road and entered judgment in Appellees' favor and against Appellant in that amount (R. 52, 54).

B. The condemnation action relating to the Gossler land.

On June 18, 1942 (R. 35, 49) (after Appellees had completed the construction of their road) by appropriate orders in proceedings filed in the court below, the United States was granted possession of the Gossler

and Crocker lands upon which approximately two-thirds of Appellees' road was constructed.

The United States never procured, through legal proceedings, an order for possession of the property owned by Crown Zellerbach Corporation adjacent to the Santiam Bar upon which Appellees had constructed the balance of their road (R. 35, 49).

Appellee Gallagher was joined as a defendant in the condemnation action relating to the Gossler land and during the course of said action Appellees McNutts intervened (R. 35, 50). None of Appellees were joined in the condemnation action relating to the Crocker land (R. 35, 50).

On October 5, 1942, the United States filed declarations of taking, accompanied by deposits of appropriate funds, in the Gossler and Crocker condemnation actions (R. 35, 50).

On November 21, 1944 (after the United States Army had used Appellees' road to take 66,643 cubic yards of sand and gravel from the Santiam Bar, without having paid Appellees anything for such use), the condemnation action to determine the value of Appellees' interest in the Gossler land came on regularly for trial in the court below (R. 35, 50).

By various motions and proceedings prior to the trial

of the condemnation action relating to the Gossler land, the United States took the position that all it had to do in the Gossler case was to pay Appellees the replacement cost of approximately one-third of their road which was constructed on the Gossler property (R. 135, 136).

At the commencement of the trial, however, counsel for the Government stated that they would not object to testimony showing the value of the entire road (R. 36). It was thereupon stipulated that the value of Appellees' interest in the entire road should be tried (R. 36).

When it came time to instruct the jury, the trial judge submitted only the question of the value of Appellees' interest in the Crocker and Gossler lands and not their interest in the Crown Zellerbach land, saying:

"On June 18, 1942, the Government took the Crocker and Gossler lands and the Gallagher and the McNutt brothers' interest therein. As a result of this taking of these interests the United States is required to pay just compensation. * * * The sole consideration for you is the fair market value of the Gallagher and McNutt property interests. You will, then, not take into consideration in your deliberations the cost of construction of the road over either of the pieces of property, or the purchase price of the right-of-way, but only the fair market

value of the interest of McNutt and Gallagher as of the date June 18, 1942.” (R. 77, 78).

A form of verdict providing for the insertion of an amount to cover the full market value of Appellees’ interest in 1.8 mile of road leading to the Santiam Bar, said road crossing, among other lands, a tract formerly owned by the Gosslers, was submitted to the jury (R. 84) and it returned a verdict for \$1,000.00 upon which judgment was entered (R. 82).

Because Appellees did not feel that the instructions of the trial court had submitted to the jury the value of their interest in the whole road and for various other reasons, they filed a motion for new trial (R. 136, 137). At the conclusion of the argument of the motion for new trial in the Gossler case, the trial court said :

“I think the Court will not pass on the question whether or not the Tucker Act cases were involved in this matter, and whether the verdict was on those cases or not. That would be a question in another lawsuit.” (R. 78)

Then referring to the Gossler case, the Court said :

“As I take it, that involved simply the trial as to the value of this easement over a particular piece of land. * * * It is true that the Court did not submit to the jury the value of the easement over other lands, * * *.” (R. 78)

In the written opinion handed down by the trial judge on the motion for new trial in the Gossler case, the court said :

“If in some other case, the defendants (appellees) contend that for jurisdictional reasons the interests were not legally so submitted, the question of the effect of the stipulation and this judgment can be thus considered and the rules of *res judicata* applied.” (R. 138)

C. The issues submitted and the findings of the trial court.

In the court below Appellant contended in its pleadings that the claim asserted in the complaint had been adjudicated, fully paid and satisfied in the condemnation action relating to the Gossler land (R. 28, 29).

Following the pretrial conference a pretrial order was entered submitting for determination the following issues (R. 38, 39) :

“I

“Whether the Defendant (Appellant) herein acquired ownership of that portion of Plaintiffs’ (Appellees’) road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land.

“II

“Assuming the Defendant (Appellant) herein acquired ownership of that portion of Plaintiff’s (Appellees’) road which was constructed upon land owned by Crown Zellerbach Corporation, whether it acquired title to the Crown Zellerbach portion of the road prior to November 21, 1944.

“III

“Assuming either (1) the Defendant (Appellant) did not acquire ownership of that portion of Plaintiffs’ (Appellees’) road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land, or (2) that defendant (Appellant) acquired title to the Crown Zellerbach Corporation portion of the road on November 21, 1944, whether plaintiffs (Appellees) have a valid claim against the defendant (Appellant) for hauling 66,643 cubic yards of sand and gravel over that portion of their road constructed upon the land owned by Crown Zellerbach Corporation.

“IV

“Assuming Plaintiffs (Appellees) have a valid claim against the defendant (Appellant) for its use of that portion of their road constructed upon the

land owned by Crown Zellerbach Corporation, the amount which Plaintiffs (Appellees) are entitled to recover from Defendant (Appellant).”

In determining the issues submitted for its consideration, the trial court had before it the whole record in the Gossler condemnation action, including the pleadings, the testimony, the exhibits, the instructions, the verdict and the judgment, together with the motion for new trial and the opinion and order thereon (R. 135, Appellant’s Brief p. 12).

It thereupon rejected Appellees’ defense and found as a fact:

“Plaintiffs’ (Appellees’) claim presented herein for the reasonable and fair market value of the use by the Government of their road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land.” (Finding XIX, R. 52)

The trial court further found that the reasonable and fair market value of Appellant’s use of Appellees’ road was and is the sum of \$5,816.00, upon which judgment was entered (R. 52, 54).

While the full record in the Gossler condemnation action was before the trial court, it has not been included in the record on appeal herein. The portions of the rec-

ord in that case which are in this record on appeal show that the value of the whole road was not submitted by the trial court to the jury in its instructions (R. 77) and that the trial court did not consider that the value of the whole road was so submitted (R. 78).

Thus it appears that the trial court which heard the Gossler condemnation action and the trial court which heard and determined this action below have both determined that the claim asserted herein has not been submitted, considered or decided in any other action.

. PROPOSITIONS OF LAW INVOLVED

I

Since the whole record in the condemnation action relating to the Gossler land was before the court below and was considered by it in making its Findings of Fact and since said record is not included in the record on appeal herein, Appellant may not attack the findings of fact on this appeal.

Lubetich v. United States, 315 U. S. 57, 62 S. Ct. 449, 86 L. ed. 677.

Griffiths Dairy v. Squire (C.C.A. 9th), 138 F. (2d) 758.

Petition of Gogate (C.C.A. 3rd), 126 F. (2d) 1020.

Sublette v. Servel (C.C.A. 8th), 124 F. (2d) 516.

United States v. Foster (C.C.A. 9th), 123 F. (2d) 32.

Boyle v. United States (C.C.A. 9th), 149 F. (2d) 201.

Federal Rules of Civil Procedure, Rule 52 (a), 28 U.S.C.A., following Section 723c.

Since no condemnation action was ever filed relating to the Crown Zellerbach Corporation property and Appellees were not joined in the condemnation action relating to the Crocker land and no Tucker Act case prior to this one was ever filed to recover the value of the Government's use of Appellees' road, Appellant never acquired title to the whole road and Appellees are entitled to recover.

(a) The only way the Government can acquire title to real property without a voluntary conveyance is by a condemnation proceeding or by payment of a judgment recovered by the land owner in a Tucker Act case.

United States v. Lynah, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

(b) Where one entitled to exercise the right of eminent domain enters upon land without first compensating the owner, the owner may sue for the value of the land and upon payment of the judgment a grant of the land for public use is effected.

United States v. Portneuf-Marsh Valley Irr. Co., 205 Fed. 416.

(c) Where one entitled to exercise the right of eminent domain enters upon land without first compensating the owner, the owner may sue for the value of his

land and also for the value of its use pending determination of the value of the land and payment of the award.

Fletcher v. Delaware L. & W. R. Co. (C.C.A. 2d), 79 F. (2d) 306.

Sanders v. Portland & O. C. Ry. Co., 98 Ore. 620, 193 Pac. 660.

United States v. Certain Parcels of Land at Hempstead, etc. (D. C., E. D. N. Y.), 51 F. Supp. 726.

(d) The Government's possession and use of property without making a deposit under the Declaration of Taking Act or payment of a judgment in a condemnation action does not pass title to the Government. Title passes as of the date of the filing of the declaration of taking or if no declaration of taking is filed, as of the date of payment of the judgment.

United States v. Certain Parcels of Land, etc. (D. C. D. Md.), 61 F. Supp. 164.

United States v. Certain Parcels of Land at Hempstead, etc. (D. C., E. D. N. Y.), 51 F. Supp. 726.

(e) Under the Oregon constitution, one authorized to acquire property by the exercise of the power of eminent domain does not acquire title until payment of the judgment and then as of the date of payment and not as of date of filing the proceeding.

City of Salem v. Marion County, 171 Ore. 254, 137 P. (2d) 977.

(f) In condemnation proceedings title passes when

the declaration of taking is filed and appropriate deposit is made and not when possession is taken.

United States v. 150.29 Acres of Land, etc, in Milwaukee C., Wis. (C.C.A. 7th), 135 F. (2d) 878.

(g) If no declaration of taking is filed, title passes when the condemnation judgment is paid.

United States v. Bouchard (C.C.A. 2d), 64 F. (2d) 482.

Barnidge v. United States (C.C.A. 8th), 101 F. (2d) 295.

(h) One not joined in a condemnation proceeding is not bound by the proceeding and loses no rights thereby. A Tucker Act case is the proper method of securing compensation.

United States v. Certain Parcels of Land (D.C.D. Md.), 40 F. Supp. 436.

Phillips v. United States (C.C.A. 7th), 151 F. (2d) 645.

ARGUMENT

Since the evidence upon which the trial court's findings of fact were made is not included in the record on appeal, Appellant may not attack them.

The Government's defense to this action, which was asserted in its answer, was that the claim asserted in the Complaint had been adjudicated, fully paid and satisfied in the condemnation action relating to the Gossler land (R. 28, 29). This defense raised issues of fact as to

what was submitted by the parties for determination, as to what was submitted by the court to the jury for determination and as to what was decided in the Gossler action.

In order to determine these fact issues, the trial court had before it the whole record in the Gossler condemnation action, including the pleadings, the exhibits, the testimony, the instructions, the verdict and the judgment, including the motion for new trial, the trial court's comments at the time the motion was argued and its opinion on the motion for new trial (R. 135, Appellant's Brief, p. 12).

The record in the Gossler condemnation action has not been made a part of the record on appeal herein so that Appellant is not in a position to challenge the trial court's finding:

“Plaintiff's (Appellees') claim presented herein for the reasonable and fair market value of the use by the Government of their road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land.” (Finding XIX, R. 52)

The authorities are unanimous in holding that an appellate court may not review a finding of fact made in the trial court where the evidence upon which the trial court based its finding is not a part of the record on appeal.

The authorities upon which we rely to support our position in this regard are cited on Page 12 herein under Appellees' Proposition of Law I.

Since no condemnation action was ever filed relating to the Crown Zellerbach Corporation property and Appellees were not made parties to the condemnation action relating to the Crocker land and no other Tucker Act case to recover the value of the Government's use of Appellees' road has ever been filed, the Government never acquired title to the whole road and Appellees are entitled to recover.

It is one of the agreed facts in this case that :

“Defendant (Appellant) has never procured, through legal proceedings, an order for possession of the property owned by Crown Zellerbach adjacent to the Santiam Bar, upon which Plaintiffs' (Appellees) constructed the balance of their road.”
(R. 35)

The only way the Government can acquire title to real property without a conveyance is by condemnation proceedings or by payment of a judgment recovered by the land owner in a Tucker Act case.

United States v. Lynah, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

If the Government had condemned all three parcels of property, including the Crown Zellerbach Corporation property, the Gossler land and the Crocker land, upon which Appellees' road was constructed, then Appellees

would have no claim for the Government's use of any portion of their road after declarations of taking were filed, supported by deposits of appropriate funds, or if no declaration of taking were filed after payment of judgments in the condemnation actions. ¹

Since Appellees were joined as defendants only in the condemnation action relating to the Gossler land and their road extended over two other pieces of property, the Government was not in a position to acquire title to the portions of the road constructed upon the Crown Zellerbach property and upon the Crocker property without some other proceeding being filed. ²

At the time the condemnation action relating to the Gossler land came on for trial, Appellees therefore had three separate and distinct Tucker Act claims in addition to their right to compensation in the Gossler condemnation action.

First—since Appellees were not joined as parties in the condemnation action relating to the Crocker land, although their easement from the Crockers was of rec-

¹ *United States v. Certain Parcels of Land, etc.* (D. C. D. Md.), 61 F. Supp. 164; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.

² *United States v. 150.29 Acres of Land, etc. in Milwaukee C., Wis.* (C.C.A. 7th), 135 F. (2d) 878; *United States v. Bouchard* (C.C.A. 2d), 64 F. (2d) 482; *Barnidge v. United States* (C.C.A. 8th), 101 F. (2d) 295; *United States v. Certain Parcels of Land* (D. C. D. Md.), 40 F. Supp. 436; *Phillips v. United States* (C.C.A. 7th), 151 F. (2d) 645.

ord and their road thereon had been built, they had a Tucker Act claim against the United States for the reasonable and fair market value of their interest in the Crocker land.³

Second—they also had another Tucker Act claim for the reasonable and fair market value of the use made by the Government of their road upon the Crocker land up to the time of payment for their interest in the Crocker land.⁴

Third—since the Government did not attempt to condemn the Crown Zellerbach Corporation portion of the road and their use of the road was made with knowledge of Appellees' ownership of the road, Appellees had a Tucker Act claim for the reasonable and fair market value of the use made by the Government of their road on the Crown Zellerbach Corporation property.

Appellant does not claim that evidence was introduced in the Gossler condemnation action concerning the use made by the Government between October 1, 1942, and August 19, 1944, of Appellees' road in removing 66,643 cubic yards of sand and gravel from the Santiam Bar. No such evidence was submitted or considered by the

³ *United States v. Certain Parcels of Land* (D. C. D. Md.), 40 F. Supp. 436; *Phillips v. United States* (C.C.A. 7th), 151 F. (2d) 645.

⁴ *Fletcher v. Delaware L. & W. R. Co.* (C.C.A. 2d), 79 F. (2d) 306; *Sanders v. Portland & O. C. Ry. Co.*, 98 Ore. 620, 193 Pac. 660; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.

jury in the condemnation action relating to the Gossler land.

Appellant's position is that the Government cannot be required to pay Appellees for their road and then pay for the use thereof (Appellant's Brief P. 14).

The Government's argument in this regard raises the question as to when title passes to the Government and whether the land owner may recover for the use of his land prior to the Government's acquisition of title.

Obviously, if the Government had paid Appellees for their interest in the Crown Zellerbach land, in the Gossler land and in the Crocker land *before* it made use thereof, or if condemnation actions had been filed in which Appellees were joined as parties covering all three parcels of land and declarations of taking had been filed, accompanied by deposits of appropriate funds, then Appellees could not recover for use made by the Government of their road after payment therefor or after the declarations of taking were filed.

It must be conceded that since the Government filed an appropriate condemnation action with relation to the Gossler land in which Appellees were joined as defendants and in which case a declaration of taking was filed, accompanied by the deposit of appropriate funds, that the Government acquired Appellees' interest in the

Gossler land as of October 5, 1942, when the declaration of taking was filed.

However, since Appellees were *not* joined as parties in the condemnation action relating to the Crocker land and since no prior Tucker Act claim has ever been filed with respect to it, their interest therein had not been acquired when the Government made use of the road between October 1, 1942, and August 19, 1944, in removing 66,643 cubic yards of sand and gravel from the Santiam Bar.

In addition, since no condemnation action was ever filed with relation to the Crown Zellerbach portion of the property and no prior Tucker Act claim has ever been filed with respect to the Government's use of Appellees' road upon the Crown Zellerbach property, they are clearly entitled to recover for the Government's use of the Crown Zellerbach portion of the road.

If it be assumed (the possibility of which assumption we expressly deny) that Appellees' interest in their road over the Crocker land and over the Crown Zellerbach land were submitted for determination by virtue of the stipulation made on November 21, 1944, when the condemnation action relating to the Gossler land came on for trial, the Government at the final conclusion of that case and upon payment of the award would acquire

title to Appellees' interest in the Crocker land and in the Crown Zellerbach land *as of the date of payment of the judgment and not before.*⁵

Since the Government's use of Appellees' road was made prior to November 21, 1944, and prior to payment of the award in the condemnation case relating to the Gossler land, the Government would still be liable to the owners for the use made of the Crown Zellerbach and Crocker portions of their road prior to its acquisition of the title thereto.⁶

Where one entitled to exercise the power of eminent domain enters upon land without first compensating the owner, the condemning authority does not acquire title to the property involved until payment of the award and

⁵ *United States v. Certain Parcels of Land, etc.* (D. C. D. Md.), 61 F. Supp. 164; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726; *City of Salem v. Marion County*, 171 Ore. 254, 137 P. (2d) 977; *United States v. 150.29 Acres of Land, etc. in Milwaukee C., Wis.* (C.C.A. 7th), 135 F. (2d) 878; *United States v. Bouchard* (C.C.A. 2d), 64 F. (2d) 482; *Barnidge v. United States* (C.C.A. 8th), 101 F. (2d) 295; *United States v. Certain Parcels of Land* (D. C. D. Md.), 40 F. Supp. 436.

⁶ *Fletcher v. Delaware L. & W. R. Co.* (C.C.A. 2d), 79 F. (2d) 306; *Sanders v. Portland & O. C. Ry. Co.*, 98 Ore. 620, 193 Pac. 660; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.

the title so acquired is as of the date of payment and not as of the date of the filing of the proceeding.⁷

The owner still possesses a claim for the reasonable and fair market value of the condemning authority's use of its land made up to the time when the award is made and title vests in the condemning authority.⁸

It is apparent, therefore, that even if it be assumed that Appellees submitted for determination in connection with the condemnation action relating to the Gossler land, the value of their interest in the portions of their road constructed upon the Crown Zellerbach land and upon the Crocker land that the Government did not acquire title to the Crown Zellerbach segment or to the Crocker segment, which aggregated two-thirds of the

⁷ *United States v. Certain Parcels of Land, etc.* (D. C. D. Md.), 61 F. Supp. 164; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726; *City of Salem v. Marion County*, 171 Ore. 254, 137 P. (2d), 977; *United States v. 150.29 Acres of Land, etc. in Milwaukee Co., Wis.* (C.C.A. 7th), 135 F. (2d) 878; *United States v. Bouchard* (C.C.A. 2d), 64 F. (2d) 482; *Barnidge v. United States* (C.C.A. 8th), 101 F. (2d) 295; *United States v. Certain Parcels of Land* (D. C. D. Md.), 40 F. Supp. 436.

⁸ *Fletcher v. Delaware L. & W. R. Co.* (C.C.A. 2d), 79 F. (2d) 306; *Sanders v. Portland & O. C. Ry. Co.*, 98 Ore. 620, 193 Pac. 660; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.

length of Appellees' road, until November, 1944, which was after the Government's use of Appellees' road.

Therefore, even if it be assumed that Appellees' interest in the whole road was submitted in the Gossler case, Appellees are entitled to recover in this proceeding the reasonable and fair market value of the Government's use of two-thirds of their road prior to the Government's acquisition of title thereto.

The evidence supports the amount of the trial court's award.

In its brief Appellant assails the trial court's finding of fact that the reasonable and fair market value of its use of Appellees' road was and is the sum of \$5,816.00 (R. 52).

Appellant complains that the trial court took Appellees' cost of constructing the road into consideration in reaching its award.

However, the contract between Crown Zellerbach Corporation and Appellee Gallagher of April 11, 1942 (R 5, 97), provides that any other party to whom Crown Zellerbach might grant the right to take sand and gravel from the Santiam Bar would be entitled to use Appellees' road only if they reimbursed Appellees on a reasonable royalty rate on a per cubic yard basis not greater than a fair share or proportionate cost of constructing and maintaining such road, taking into consideration the yardage of sand and gravel hauled by Ap-

pellees and the yardage of sand and gravel hauled by such other person (R. 8, 100).

The Government acquired the right from Crown Zellerbach to take gravel from the Santiam Bar with the distinct and express understanding that Appellees' rights under their contract of April 11, 1942, would be protected (R. 38, 52, 72).

The cost of the road, the use made thereof by Appellees in removing sand and gravel from the Santiam Bar over the road, the amount paid by Strong and McDonald as reimbursement to Appellees in connection with their use of the road—all were pertinent factors to be taken into consideration in determining the amount which the Government should pay for its use of the road, since Appellees were limited by their contract with Crown Zellerbach to recovery of the cost of their road taking into consideration their own use thereof.

In any event, Appellees' testimony introduced in the court below is to the effect that 10c a cubic yard was the reasonable and fair market value of the use of the road made by the Government. Since the Government took out 66,643 cubic yards over the road, the evidence sustains a recovery of more than was allowed by the trial court.

Appellant's only testimony is to the effect that 2c a yard would be a fair royalty for the use of six-tenths of a mile, which was the Crown Zellerbach segment of the road. Appellant has entirely overlooked the fact that

Appellees are entitled to be compensated for the Government's use of the Crocker segment of the road which use was made prior to the payment of the award in the condemnation action relating to the Gossler land.

The Government therefore submitted no testimony relating to the reasonable and fair market value of the use made by the Government of that portion of Appellees' road which was not owned by it at the time its use was made.

It is apparent therefore that the trial court's finding as to the amount Appellees are entitled to recover should be sustained.

CONCLUSION

Appellant's failure to include in this record the record in the condemnation action relating to the Gossler land has deprived it of the right to challenge the trial court's finding of fact based upon a review of the record in the Gossler condemnation action. Since the trial court found that Appellees' claim asserted herein was not submitted, considered or decided in the condemnation action relating to the Gossler land, the judgment appealed from must be affirmed. In any event, the Government did not acquire title to two-thirds of Appellees' road until after it had used it. The Government is therefore obligated to

pay for its use prior to acquisition of title thereto and the judgment appealed from must be affirmed.

Respectfully submitted,

LAWRENCE T. HARRIS,
201 Miner Building,
Eugene, Oregon,

KOERNER, YOUNG, SWETT & MCCOLLOCH,
JAMES C. DEZENDORF,
800 Pacific Building,
Portland 4, Oregon,

Attorneys for Appellees.

